NO. 20305

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ULYSEES GRANT LEEKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty as charged in all counts of a four-count Indictment, at the conclusion of trial without a jury [C. T. 2-6, 26]. [1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Sections 174 and 176(a). Jurisdiction of this Court rests pursuant

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[1] "C. T." refers to Vol. I of the Transcript of Record. Vol. I is the Clerk's Transcript.

to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant and one Norman Dean were charged in all counts of a four-count Indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant, with intent to defraud the United States, knowingly smuggled and clandestinely introduced approximately 140 pounds of marihuana into the United States from Mexico, and that Dean knowingly aided, abetted, assisted, counseled, induced, and procured the commission of that offense [C. T. 2-3].

Count Two charged that appellant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 140 pounds of marihuana, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that Dean knowingly aided, abetted, assisted, counseled, induced, and procured the commission of that offense [C. T. 5].

Count Four charged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately fifty grams of heroin, a narcotic drug, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that Dean knowingly aided, abetted, assisted, counseled, induced, and procured the commission of

[illegible]

[illegible]

[illegible]

[illegible]

that offense [C. T. 6].

Appellant's motion to suppress evidence was heard and denied on May 20, 1965 [R. T. 3, 4, 89]. [2/] Appellant filed an "affidavit of bias" on the following day [C. T. 24-25].

Appellant waived trial by jury [R. T. 89]. He was tried alone. His court trial commenced on May 21, 1965, before United State District Judge Roger T. Foley. Appellant was found guilty as charged on that date [R. T. 96, 119, 190]. Thereafter, on May 26, 1965, appellant was committed to the custody of the Attorney General for fifteen years on Count One, fifteen years on Count Two, twenty years on Count Three, and twenty years on Count Four, each of the sentences to run concurrently [C. T. 26]. He thereafter filed a timely notice of appeal [C. T. 27-28].

III

ERROR SPECIFIED

The Opening Brief of appellant (p. 9) lists the following points upon appeal:

> "1. The trial judge erred in proceeding with the trial of this matter after the affidavit of bias was filed.
>
> "2. The trial judge erred in denying the Motion to Suppress and in admitting the evidence

---

[2/] "R. T." refers to the Reporter's Transcript, which consists of Volume II of the "Transcript of Record".

confiscated in the search and seizure."

IV

STATEMENT OF THE FACTS

A. The Motion to Suppress Evidence.

On March 14, 1965, United States Customs Agent Neil Greppin observed a 1961 Ford Thunderbird automobile at the parking lot of Oscar's Drive-In at San Ysidro, California, about 200 yards from the port of entry between Tijuana, Mexico and San Ysidro, California [R. T. 30-32].

The lone occupant of the Ford "faced in the direction of the Border, as if he was watching for someone coming from the Border; in other words, waiting for someone to enter the United States" [R. T. 32].

Agent Greppin, who had had about six years of experience as a Customs Agent in Southern California, sent a radio message for a registration check on the license number of the Ford. He learned that it was registered to Tucson Moore, known to Agent Greppin to be a seller of heroin and other drugs [R. T. 30, 32, 33].

While Agent Greppin was watching, appellant entered the United States from Mexico by himself in a 1959 Ford station wagon and proceeded to the north. As the station wagon came adjacent to the 1961 Ford, the latter vehicle left the parking area and pulled in behind appellant's Ford [R. T. 34].

Agent Greppin called by radio to Officers Burnett and Carter, advised them of what he had observed, including the Tucson Moore information, and requested that they "follow the vehicle until they make a determination as to what vehicle the 1961 Ford Thunderbird was following, and after they had made a determination, to use their own judgment as to stopping the vehicle" [R.T. 34, 81].

As part of Agent Greppin's experience he had learned that 1957, 1958, and 1959 Ford station wagons were used more often than other types of vehicles for smuggling from Mexico into the United States [R. T. 40, 41]. Customs Port Investigator Donald Carter observed a new registration slip on the windshield of the Ford station wagon. He testified that "from prior knowledge of vehicles being used to smuggle narcotics into the United States, this appears to be a modus operandi of how they operate. They purchase a used vehicle in that vintage or year, and this particular year vehicle is used quite frequently to smuggle narcotics." [R.T. 44-45].

Officers Burnett and Carter followed the Ford station wagon and the Ford Thunderbird. The station wagon was leading, and the two vehicles were maintaining a steady distance between each other. They "would change lanes frequently, going from one to another. Every time the station wagon would make a move from one lane to the other, the Thunderbird would make the same movement, staying approximately the same distance in back of the first vehicle." [R. T. 43-44].

The officers reached a position between the two Fords. At

a traffic light in San Diego the station wagon and the Customs officer's vehicle went through, but the Thunderbird was stopped by a red traffic light. "We observed at this time the station wagon to slow down to approximately 25 miles an hour, pull way over to the right-half side, the farther right-hand lane, and he appeared to be looking in his rear-view mirror." [R. T. 45-46]. After about a half of a mile of travel, Officer Carter "observed the Thunderbird coming at a high rate of speed, cutting in and out of traffic, and appearing to be trying to catch up with us" [R. T. 46].

"When he spotted the station wagon, then he slowed down to approximately the same speed, which was about 25 to 30 miles an hour, fell back of our vehicle, and in the same lane." [R. T. 46].

"Then the station wagon appeared to be observing the Thunderbird in back of him, and he picked up his speed to approximately 40 or 45 miles an hour again." The Thunderbird maintained the same speed and distance as before [R. T. 46].

The officers used a red light and siren to stop the station wagon at a point from 12 to 15 miles from the international border at San Ysidro [R. T. 46, 65]. The Thunderbird "slowed way down, looked at us, looked at the subject's vehicle, and then he took off at a high rate of speed, and went north on Highway 101" [R. T. 60-61]. The intention of the officers was to stop the vehicle and talk to the occupant and search the vehicle if a search was warranted [R.T. 57].

Officer Burnett identified himself to appellant. Appellant

said he was coming from San Diego. Then he said he was coming from Mexico. When asked whether he was bringing any merchandise or contraband back from Mexico, he did not answer. When asked whether he would consent to a search of the station wagon, he did not answer [R. T. 47, 85].

Officer Carter placed his hand on a door of the station wagon and smelled a very strong odor of marihuana from inside the vehicle [R. T. 47]. Appellant was then placed under arrest [R. T. 85].

Officer Carter then found packages of marihuana between the door paneling and the frame of the vehicle [R. T. 48, 74, 76]. After the vehicle was moved to an office, Customs officers found more marihuana, as well as a quantity of heroin inside the door paneling [R. T. 48, 74, 76]. The officers had neither a warrant of arrest nor a search warrant [R. T. 63-64].

During the trial which followed the motion to suppress evidence, Officer Carter testified that his experience had included an undercover narcotics, vice, and marihuana assignment with the Newport Beach City Police [R. T. 157].

B. The Affidavit of Alleged Bias.

On May 21, 1965, appellant filed an "Affidavit of Bias", alleging that the trial judge "has a personal bias and prejudice against me", giving the following grounds: "That said District Judge at the hearing of the motions to suppress in the above

entitled matter, exhibited a distain for both myself and my counsel, Frank A. St. Sure. That he seemed not to listen to the arguments of my said counsel, and that by his manner and attitude he seemed extremely prejudice and bias against myself, my counsel, and the crime of which I am charged. That on several occasions during the hearing of said motion to suppress, he made statements to my counsel indicating a prejudice and bias toward my counsel and myself." [C. T. 24-25].

The affidavit also stated that neither appellant nor his counsel had ever seen the trial judge before May 20, 1965 [C. T. 25].

Appellant claimed that the trial judge did not seem to listen to the arguments of counsel, not that he failed to listen to the testimony [R. T. 113]. Appellant's counsel had waived argument at the hearing of the motion to suppress evidence [R. T. 88-89]. He later waived closing argument during the court trial of the case [R. T. 189].

The trial judge stated:

"I assure you that I have no prejudice at all against Counsel or against his client, and I am not going to have any prejudice or feeling." [R. T. 111].

V

ARGUMENT

A. NO ERROR WAS COMMITTED BY PROCEEDING WITH THE TRIAL AFTER THE AFFIDAVIT OF ALLEGED BIAS WAS FILED.

Appellant asserts that the trial judge committed error by proceeding with the trial after the filing of the affidavit alleging bias.

Section 144 of Title 28, United States Code, requires that a judge withdraw from a proceeding upon the filing of a "timely and sufficient affidavit" alleging bias or prejudice (emphasis added). Appellant filed an affidavit. The trial judge considered the affidavit to be insufficient and proceeded with the trial [R. T. 107, 111, 113, 119]. Appellant made no attempt to withdraw his waiver of the right to trial by jury [R. T. 89, 114].

In considering a statutory predecessor of Section 144, the Supreme Court of the United States announced the rule that "the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartially of judgment". (emphasis added).

Berger v. United States, 255 U.S. 22,
at 33-34 (1921).

The affidavit must state sufficient facts to support the

claim of bias.

> Willenbring v. United States, 306 F. 2d 944, at 945-46 (9th Cir. 1962);
>
> Price v. Johnston, 125 F. 2d 806, at 811-12 (9th Cir. 1942), cert. denied, 316 U. S. 677 (1942), rehearing denied 316 U. S. 712 (1942).

The Supreme Court stated in discussing the earlier similar disqualification statute:

> "It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice." (emphasis added).
>
> Ex Parte American Steel Barrel Co., 230 U. S. 35, at 43-44 (1913).

This Court has added that "These facts 'should be set out with at least that particularity one would expect to find in a bill of particulars filed by a pleader in an action at law to supplement and explain the general statements of a formal pleading' ".

> Wilkes v. United States, 80 F. 2d 285, at 289 (9th Cir. 1935).

The district judge may pass upon the sufficiency of the affidavit of alleged bias.

Berger v. United States, supra, at 36;
Willenbring v. United States, supra, at 945;
Taylor v. United States, 179 F. 2d 640, at 644 (9th Cir. 1950).

> "It is well settled that the trial judge has authority in the first instance to pass upon the sufficiency of the affidavit [citing cases]."

Taylor, supra, at 644.

He does not pass upon the truth or falsity of the alleged facts.

Willenbring v. United States, supra, at 945-46.

Where the showing is insufficient, it is the duty of the judge to remain in the case.

Eisler v. United States, 170 F. 2d 273, at 278 (D. C. Cir. 1948), writ of cert. dismissed, 338 U. S. 883 (1949).

> "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is."

In Re Union Leader Corporation, 292 F. 2d 381, at 391 (1st Cir. 1961), cert. denied, 368 U. S. 927 (1961).

An affidavit is not sufficient if based upon mere conclusions of bias and prejudice.

Willenbring v. United States, supra, at 946;
Williams v. Pierce County Bd. of Comm'rs., 267 F. 2d 866 (9th Cir. 1959).

There is a presumption in favor of the integrity of the trial judge.

Craven v. United States, 22 F. 2d 605, at 608 (1st Cir. 1927), cert. denied, 276 U. S. 627 (1928).

> "In sum, a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary."

In Re Union Leader, supra, at 389.

Considering appellant's affidavit in the light of the above-mentioned principles of law, it is respectfully submitted that the affidavit falls far short of the mark. The total contents of the affidavit in regard to the alleged bias and prejudice consist of the following:

> " . . . has a personal bias and prejudice against me . . . . That said District Judge at the hearing of the motions to suppress in the above entitled matter, exhibited a distain for both myself and my counsel, Frank A. St. Sure. That he seemed not to listen to the arguements of my said counsel, and that by his manner and attitude he seemed

> extremely prejudice and bias against myself, my counsel, and the crime of which I am charged. That on several occasions during the hearing of said motion to suppress, he made statements to my counsel indicating a prejudice and bias toward my counsel and myself." [C. T. 24-25].

The allegation of bias against the alleged "crime" may be disregarded. The statute refers to "personal" bias.

Price v. Johnston, supra, at 811.

Thus the factual basis of the affidavit boils down to the following:

(1) Alleged disdain for appellant and his counsel.

(2) Assertion that the judge "seemed not to listen" to arguments.

(3) ". . . manner and attitude. . . ."

(4) ". . . statements . . . indicating a prejudice and bias . . ." [C. T. 24-25].

With the possible exception of the vague assertion about seeming not to listen to arguments, all of the above claims are bald, general conclusions without any reference whatsoever to specific factual situations.

If these general statements were found to contain that particularity "one would expect to find in a bill of particulars" (Wilkes, supra), it is difficult to imagine a claim that would not satisfy the test. The assertion that the trial Judge seemed not to listen to arguments

should be considered in light of the fact that appellant waived closing argument at the hearing of the motion to suppress evidence [R. T. 88-89] and again waived argument at the conclusion of the trial [R. T. 189].

One may search the Transcript of Record, the affidavit, and the Opening Brief of Appellant in an effort to locate the source of appellant's discontent. There seemed to be some lack of mutual agreement between the court and counsel for appellant during the hearing of the motion to suppress evidence, but stretching this routine incident into a claim of bias against _counsel_ can hardly satisfy the requirement of showing a personal bias against _appellant._

The bias sought to be relieved against is a personal bias against a party or in favor of his opponent.

Price v. _Johnston,_ _supra,_ at 812. [3/]

The above- quoted allegation that bias was shown by the trial judge's unquoted "statements" is very similar to the claim in _Craven,_ _supra,_ at 606, that the trial judge exhibited personal

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[3/] This Court found no personal bias in a trial judge's comments on the appellant's method of conducting his case".

Beecher v. _Federal Land Bank,_ 153 F. 2d 987, at 988 (4th Cir. 1945), cert. denied, 328 U. S. 871 (1946).

The Sixth Circuit found an insufficient assertion of bias in a claim that the trial judge was the source of "remarks indicating irritation at appellant's dilatory tactics".

Refior v. _Lansing Drop Forge Co.,_ 124 F. 2d 440 (6th Cir. 1942), cert. denied, 316 U. S. 67 (1942).

bias and prejudice "by questions the court asked the witnesses upon the stand". The First Circuit ruled (at p. 607):

> "There is nothing in the fourth and fifth paragraphs of the affidavit. A general and epithetical charge of bias, by questions not set forth, is idle."

Craven also holds (at p. 607) that the disqualification statute does not apply where the affidavit of alleged bias is "grounded on the evidence produced in open court at the first trial, and on nothing else".

The affidavit must not be based upon facts occurring during trial.

> *Berger* v. *United States*, *supra*, at 34.
>
> "The *conduct* and rulings of the trial judge in the case itself provides no basis for an affidavit of bias or prejudice." (emphasis added).
>
> *Chessman* v. *Teets*, 239 F.2d 205, at 215 (9th Cir. 1956), rev'd. upon other grounds, 354 U.S. 156 (1957).

In *Chessman*, *supra*, most of the reasons set forth upon the bias issue were based upon observations and rulings by the trial judge at pretrial hearings. In the instant case the alleged conduct, etc., also assertedly occurred at a pretrial hearing, so the *Chessman* rule should operate to preclude the use of Section 144.

For these reasons, it is respectfully submitted that the trial judge committed no error in proceeding with the trial.

B. THE MARIHUANA IN QUESTION WAS LAWFULLY SEIZED.

Appellant attacks the legality of the seizure of approximately 140 pounds of marihuana from the vehicle which he was operating. However, his brief does not discuss the rules of border search, nor the authority to conduct searches under Title 19, United States Code, Sections 482 and 1581(a).

Section 1581(a) provides in pertinent part as follows:

> "(a) Any officer of the customs may at any time go on board of any . . . vehicle _at any place in the United States_ . . . without as well as within his district, . . . and examine, inspect, and search the . . . vehicle and every part thereof . . . and to this end may hail and stop such . . . vehicle, and use all necessary force to compel compliance." (emphasis added).

Section 1581(a) was quoted in _Murgia_ v. _United States,_ 285 F.2d 14, footnote at 17 (9th Cir. 1960), in which this Court held that border searches need not be made precisely at the border. A similar result was reached in _King_ v. _United States,_ 9th Cir., No. 19,624, July 2, 1965, in which this Court held that the search

of the defendant's vehicle, halted by Customs officers about eight miles from the International border, constituted a border search.

This Court also has ruled that a border search does not require probable cause to arrest or search.

> _Murgia_ v. _United States_, _supra_, at 17;
>
> _Witt_ v. _United States_, 287 F.2d 389, at 391 (9th Cir. 1961), cert. denied, 366 U. S. 950 (1961);
>
> _Bible_ v. _United States_, 314 F. 2d 106, at 108 (9th Cir. 1963);
>
> _Denton_ v. _United States_, 310 F. 2d 129, at 132 (9th Cir. 1962).

A border search requires neither a warrant nor an arrest.

> _Denton_ v. _United States_, _supra_, at 132.

> "Mere suspicion has been held enough cause for a search at the border."
>
> _Witt_ v. _United States_, _supra_, at 391, quoted with approval in _King_ v. _United States_, _supra_, and in _Bible_ v. _United States_, _supra_, at 108.

As this Court noted in _King_, _supra_ (footnote 4), the authority for border searches appears in Title 19, United States Code, Sections 482 and 1581. Furthermore, the opinion states:

> "Subdivision (d)[Section 1581] requires the driver of such a vehicle, upon direction of such an officer, to come to a stop, and authorizes pursuit if

he does not do so."

King, supra, footnote 4.

Appellant's vehicle was stopped at a point from 12 to 15 miles from the border, as compared to about 8 miles in King, supra. In Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959), a search of a vehicle at a checkpoint about 75 miles north of the Rio Grande River (hence about 75 miles from the International border) was sustained as a Customs "points of entry" search with the Court supplying the additional ground of reasonable belief by the officers that a Customs crime was being committed.

Another search a considerable distance from the border was discussed in Jones v. United States, 326 F.2d 124 (9th Cir. 1963), cert. denied, 377 U.S. 956 (1964), in which the concurring opinion of Judge Duniway stated that the search of the defendant's vehicle, which occurred at a point about 67 miles from the International border, constituted a border search under the facts of that case. This concurring opinion was cited with evident approval by this Court in Hurst v. United States, 344 F.2d 327 (9th Cir. 1965). Consequently, there does not appear to be a rigid distance limitation upon border searches, nor does any such limitation appear in the above-cited statutes upon the subject. (Appellant does not contend, of course, that any search by Customs officers at any location would necessarily constitute a border search.)

In the instant case, the officers had more than the "mere suspicion" which is sufficient cause for a border search. They had

the following information:

1. The vehicle which was ultimately searched entered the United States from Mexico and was followed by officers to the point of search (with the exception of what was apparently a few moments of time) [R. T. 34, 43-46].

2. The driver of a second vehicle had been waiting near the border as if he was waiting for someone to enter the United States [R. T. 32].

3. As the first vehicle came adjacent to the second vehicle, the latter vehicle started and pulled in behind the former [R. T. 34].

4. The operators of the two vehicles obviously attempted to keep together during a trip of from 12 to 15 miles [R. T. 43-46].

5. The second vehicle was registered in the name of Tucson Moore, a known seller of heroin and other drugs [R. T. 30, 32, 33].

6. The first vehicle was of a type "used quite frequently to smuggle narcotics!' [R. T. 44-45].

7. When the officers stopped the first vehicle, the driver of Tucson Moore's vehicle observed the scene and "took off at a high rate of speed . . ." [R. T. 60-61].

After appellant was stopped, Officer Burnett acquired additional information prior to the discovery of the contraband:

8. Appellant made a false statement about coming from San Diego [R. T. 47].

9. Appellant would not reply when asked whether he

was bringing any merchandise or contraband back from Mexico [R. T. 47, 85].

10. There was a strong odor of marihuana coming from inside the vehicle [R. T. 47].

The actions of appellant and his highway companion had led experienced Customs officers to the belief that additional investigation was necessary. To the layman, unfamiliar with the modus operandi of marihuana smugglers and their hirelings, the fact that a man appeared to be watching traffic as it attempted to cross the border at San Ysidro might not be as significant as it appeared to Agent Greppin. However, to the trained and experienced Customs agent, the circumstance was sufficiently noteworthy to justify a check upon the registration of the vehicle. When it was then ascertained that the vehicle was registered to a known peddler of heroin, and when the vehicle commenced to follow another up the highway, which latter vehicle was of a type frequently used to smuggle narcotics, Agent Greppin was alerted to the need for additional action.

Although a Customs search does not require probable cause to arrest, it is significant that the action of peace officers "is not to be 'measured by what might be probable cause to an untrained civilian passerby. When a peace officer makes the arrest the standard means a reasonable, cautious and prudent peace officer.' "

Ellis v. United States, 264 F. 2d 372, at 374 (C. A. D. C. 1959), cert. denied, 359 U. S. 998 (1959). (emphasis added).

In the instant case, the location was significant:

> "This Court will take judicial notice of the fact that the Mexico-California border is one of the major centers for the importation of narcotic drugs into the United States."

Blackford v. United States, 247 F. 2d 745, at 752 (9th Cir. 1957), cert. denied, 356 U. S. 914 (1958).

Although a border search does not require probable cause, it should be noted that once the officer smelled the marihuana, there was probable cause to search the vehicle.

Fernandez v. United States, 321 F. 2d 283, at 287 (9th Cir. 1963).

This subsequent search resulted in the discovery of marihuana [R. T. 47, 48, 74, 76].

Appellant argues that the mere stopping of his vehicle constituted an arrest, citing Henry v. United States, 361 U. S. 98 (1959). However, as Judge Hamlin clearly emphasized in Busby v. United States, 296 F.2d 328, at 332 (9th Cir. 1961), Henry is not controlling upon this question:

> "Appellants' reliance on Henry v. United States is misplaced, since the prosecution in that case conceded both at trial and on appeal that the arrest took place when the car was stopped by the federal agent, i. e., the arrest took place before any contraband was

discovered and before any probable cause existed."

Appellant also cites Plazola v. United States, 291 F. 2d 56 (9th Cir. 1961), in support of a proposition that merely stopping a vehicle constitutes an arrest. There again it is clear that the Court does not support appellant's theory:

> "Whether we agree with appellant's precise position (that his arrest was consummated when he was stopped) need not now be determined."
>
> Plazola, supra, at 59.

This Court went on to state in Plazola that there had been an arrest by the time that the suspect had experienced a series of events which included the stopping of his vehicle, his transportation by officers for two miles, interrogation, delay, and return transportation for two miles.

Furthermore, there is good reason to believe that California law would be applicable upon the question. In United States v. Di Re, 332 U.S. 581, at 589 (1948), the Supreme Court of the United States held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." In the instant case there is no applicable Federal statute. Appellant cites Title 26, United States Code, Section 7607, which includes authority for arrests by Customs officers and Narcotics officers under certain circumstances. Since Section 7607 does not define the term, "arrest", it is not applicable

to the question of when the arrest occurs. It is no more "applicable" than it was in Butler v. United States, 273 F. 2d 436 (9th Cir. 1959), in which an arrest was made by Federal Narcotics agents. This Court referred (footnote at p. 440) to Section 7607, the same statute cited by appellant herein, and applied California arrest law after citing Di Re, supra, and one other case, to the effect that state law determines the validity of arrests without warrants, subject to such minimum standards as the Supreme Court may rule are required by the Federal Constitution (footnote at pp. 441-42).

California courts have repeatedly held that merely stopping a vehicle does not constitute an arrest.

> People v. Porter, 196 Cal. App. 2d 684, at 686 (1961);
>
> People v. Ellsworth, 190 Cal. App. 2d 844, at 846-47 (1961);
>
> People v. Sanchez, 189 Cal. App. 2d 720, at 725 (1961);
>
> People v. Davis, 188 Cal. App. 2d 718, at 722 (1961);
>
> People v. King, 175 Cal. App. 2d 386, at 390 (1959) (vehicle stopped by Federal agent).

In California an arrest requires more than a mere temporary restraint.

Davis v. People of the State of California,
341 F. 2d 982, at 986 (9th Cir. 1965).

Assuming, arguendo, that Federal arrest decisions are controlling, these cases also hold that the mere stopping of a vehicle does not constitute an arrest.

Busby v. United States, supra (citing Federal cases);
United States v. Gearhart, 326 F. 2d 412, at 414 (4th Cir. 1964) (citing Federal cases);
Gilliam v. United States, 189 F. 2d 321, at 323 (6th Cir. 1951);
Morgan v. United States, 159 F. 2d 85, at 86 (10th Cir. 1947);
United States v. Bonanno, 180 F. Supp. 71, at 76-81, 85 (S. D. N. Y. 1960).

In Murgia, supra, involving the stopping of the suspects' vehicle about a mile or a mile and one-half outside of Calexico, California, and the subsequent recovery of objects thrown from the vehicle, this Court held that the arrest occurred after the evidence had been recovered (at p. 18). Thus it is evident that the stopping of the vehicle did not constitute an arrest.

Appellant cites Di Re, supra, to the effect that a passenger is not deprived of his immunity from search by his mere presence in a vehicle. However, appellant was not a passenger.

Upon the subject of probable cause to arrest, appellant cites Plazola, supra. It does not appear, however, that Plazola involved a border search.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ J. Brin Schulman
J. BRIN SCHULMAN